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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

MARY E. GORECKI,

Petitioner,

v.

PHILIP D. CARLSON and THOMAS R. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the legal standard for determining whether a public employee can be subjected to dismissal for political reasons, first enunciated in *Elrod* and then refined in *Branti*, is vague, uncertain and unworkable in practice, as demonstrated by the circuit conflicts, thus entitling Petitioner to qualified immunity from money damages liability.

PARTIES TO THE PROCEEDINGS

Respondents/Plaintiffs Phillip D. Carlson and Thomas R. Smith brought this action against the Petitioner/Defendant Mary E. Gorecki, Kane County State's Attorney. There are no other parties to these proceedings.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Carlson v. Gorecki*, 374 F.3d 461 (7th Cir. 2004) and is reprinted in the Appendix (App. 1-9). The opinion of the United States District Court for the Northern District of Illinois has not been reported. It is reprinted in the Appendix (App. 11-15).

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on June 29, 2004 (App. 1-9). Petitioner filed a Petition for Rehearing, which was denied on July 23, 2004 (App. 10). This Petition for a *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment I; United States Constitution, Amendment XIV, § 1; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Lower Court Proceedings

This case involves the termination of Plaintiffs as special investigators by Defendant Kane County, Illinois State's Attorney Mary Gorecki in December, 2000. Plaintiffs filed a two count second amended complaint alleging a First Amendment retaliation claim under 42 U.S.C. § 1983 and a state law defamation claim (App. 17-30). Defendant moved for summary judgment on the First Amendment claim on the basis of qualified immunity (App. 31-80, 184-319).

On March 12, 2003, the district court issued an opinion rejecting Defendant's qualified immunity defense and denying the motion for summary judgment (App. 11-15). Defendant timely appealed and, on June 29, 2004, the Seventh Circuit Court of Appeals affirmed the denial of summary judgment (App. 1-9). On July 23, 2004, the Court denied Defendant's petition for rehearing (App. 10). After mandate issued, the District Court stayed its proceedings pending resolution of this Petition. In granting the stay, the District Court expressly recognized the inter-circuit conflict on the issue of whether an investigator could be fired for political reasons.

B. Statement of Facts

Former Kane County State's Attorney David Akemann appointed Plaintiffs Carlson and Smith as his special

investigators in 1994 and 1999, respectively (App. 44-45, 81-82). In March 2000 Defendant Gorecki challenged Akemann in the Republican primary (App. 44, 81). Plaintiffs were friends with Akemann and actively supported his reelection campaign by advising him on political strategies and decisions, and joining him for political functions during lunchtime (App. 240-241, 276-278, 282, 296-298). Plaintiffs were also involved in assigning state's attorney employees to Akemann's political campaign functions (App. 242-243).

Defendant defeated Akemann in the primary and became a candidate in the November 2000 general election (App. 44, 81). During the ensuing campaign, Plaintiffs openly supported Defendant's Democratic opponent (App. 21). In October 2000, Plaintiff Smith authored and circulated a letter to the constituency of his township Republican Party criticizing Defendant's lack of experience, leadership, ethics, integrity and honesty, and stating that she was not "beyond reproach" (App. 21, 182-183). In November 2000, Defendant won the general election (App. 44, 81). Upon taking office on December 1, 2000, Defendant chose not to reappoint Plaintiffs as her special investigators and, instead, eliminated their positions entirely (App. 45, 82).[1]

Pursuant to Illinois statute, a state's attorney enjoys the authority to appoint special investigators to serve subpoenas, make return of process and conduct investigations which assist the state's attorney in the performance of her duties (App. 45, 72-76, 82). *See* 55 ILCS 5/3-9005(b) (West

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[1] For purposes of Defendant's qualified immunity defense only, Defendant admitted that she terminated Plaintiffs for political reasons, specifically their public support of Defendant's electoral opponents and public criticism of Defendant's reputation for honesty, integrity and competency to serve as the elected Kane County State's Attorney (App. 34).

2000). Special investigators may carry firearms with the permission of the state's attorney, and are peace officers who may exercise police powers. *Id.* Special investigators have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act, including the power to investigate criminal cases for county state's attorneys. *Id.*; 725 ILCS 210/7.06 (West 2000).[2] Based on the above statutory powers and duties, a special investigator may provide direct input into prosecutorial decisions made by the state's attorney and his assistants, including whether to charge someone with a crime, whether to bring a case before a grand jury, or whether to continue an investigation further (App. 126-129, 185-187, 190-191, 228-238, 290-292).

Special investigators serve at the pleasure and discretion of the elected state's attorney (App. 188, 190, 286-287). A state's attorney has no duty to appoint or employ a special investigator at all (*Id.*). In addition, only the state's attorney has the power to appoint, remove and discipline a special investigator (*Id.*).

Former First Assistant State's Attorney John Barsanti testified that, in the early years at the State's Attorney's Office, there were very few investigators in the office, and they mainly served subpoenas (App. 106-107). However, after Akemann was elected, he changed that function and hired a private subpoena service so that special investigators only served "panic subpoenas" which freed up their time for other tasks (App. 110-111).

Although Plaintiffs provided trial support services to prosecutors (i.e., taking photos or finding witnesses) (App. 125-126), they also conducted criminal investigations

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[2] Plaintiffs' written job descriptions with the Kane County State's Attorney's Office mirrored the statutory duties outlined above (App. 45, 77, 82, 288).

under Akemann's administration (App. 187, 235-238). For example, Plaintiff Carlson was assigned to investigate allegations of official misconduct concerning the county coroner. He issued a report and recommendation which First Assistant Barsanti relied upon in deciding not to bring criminal charges (App. 185, 237-238). In addition, special investigators were assigned to special grand juries, interviewed witnesses in homicide and other criminal cases, and routinely investigated other criminal activity (App. 187, 235). Prosecutors relied upon input from special investigators in deciding whether to bring criminal charges (App. 185, 190-191).

While special investigators did not make policy for the office directly, (App. 120), they occasionally attended policy-making meetings with Akemann and his "supervisory crew", and provided reports and input on issues (App. 185, 188-189, 220-221). Investigations conducted by a special investigator were confidential, as were discussions with the state's attorney and/or his assistants concerning those investigations (App. 190-191, 292-293). Confidentiality was a necessity, because a state's attorney would not want to jeopardize the integrity of the investigation or any resultant prosecution (*Id.*).

With regard to investigations assigned by the elected state's attorney, the relationship between the elected state's attorney and his appointed special investigator is a close one (App. 190-191, 293). Inherent in the assignment is a level of trust because the state's attorney needs to know that the special investigator is providing truthful and accurate information (App. 190-191, 293-294). Consequently, although Akemann and Barsanti testified that political allegience was not required for special investigators to perform their jobs (App. 120), they conceded that an elected state's attorney would not appoint or keep a person in the position of special investigator who publicly supported or campaigned for his political opponent (App. 184-

185, 190-191, 295-296, 233-234). They likewise conceded that an elected state's attorney would not appoint or continue the employment of a special investigator who publicly criticized the elected state's attorney's reputation for honesty, competency and integrity (*Id.*).

REASONS FOR GRANTING THE WRIT

This case involves an issue of recurring importance concerning a newly elected public official's ability to terminate an employee for political reasons without offending the First Amendment. The federal circuit courts have unsuccessfully struggled to apply the standards enunciated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The result has been a conflicting and confusing array of decisions which leave public employers without any meaningful guidance and public employees without any accurate measure of the security of their positions. As discussed below, the instant case presents a striking illustration of this confusion as elected officials in some Circuits may terminate investigators who oppose them politically without risking personal liability, while officials in other Circuits, including the Seventh Circuit, allow officials to be sued for damages for terminating identically situated employees.

The Seventh Circuit's decision in the instant case has significantly weakened the viability of qualified immunity as a defense in political termination cases. Specifically, the court's decision that state's attorney's investigators may actively politic against an ultimately successful candidate without risking any employment consequences is in direct conflict not only with the decisions of sister circuits, but also with the Seventh Circuits's own decision in *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996). Though highlighted by Petitioner below, and discussed during oral

argument, the lower court strangely made no mention of *Hernandez* in concluding that it was clearly established that State's Attorney's investigators did not occupy politically sensitive positions.

As a result of the denial of qualified immunity, public employers who misinterpret the confusing patchwork of circuit court decisions in assessing the First Amendment protections available for particular positions risk not only the potential reinstatement of terminated employees but also the risk of personal liability for money damages if that assessment turns out to be incorrect. Accordingly, there is an urgent need for this Court to revisit *Elrod* and *Branti*, and clarify both the standard governing political terminations under the First Amendment, and the role of qualified immunity in political termination cases.

I. *Elrod/Branti* Standard

In *Elrod*, this Court held that the First Amendment prohibits the firing of public employees on account of their political affiliation. 427 U.S. at 373. However, the Court recognized that political loyalty could justify dismissal of policymaking employees in order to ensure that "representative government [was] not . . . undercut by tactics obstructing the implementation of policies of the new administration." *Id.* at 367. Although the Court found that "[n]o clear line could be drawn between policymaking and nonpolicymaking positions," it set forth a number of relevant factors, including whether the person's job responsibilities were broad and not well defined, and whether the person acted as an advisor or formulator of

plans for implementation of broad goals. *Id.*[3]

In *Branti*, the Court reaffirmed that certain types of public positions remain properly subject to political considerations. However, the Court rejected *Elrod*'s categorical policymaking or confidential employee approach, and opined that "the ultimate inquiry is . . . .whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. This standard drew sharp criticism from Justice Stewart in his dissent:

> A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials.

Id. at 525. *See, generally*, Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 U. CHI. L. REV. 1369, 1380 (Fall 1989) (commenting that *Branti*'s ambiguous standard undermines the capacity of local governments to hire and fire employees free of judicial intervention because it introduces uncertainty and threat of litigation into every employment decision).

Ten years after *Branti*, this Court extended the constitutional ban on patronage dismissals to other adverse

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[3] In concurrence, Justice Stewart narrowly interpreted the plurality's decision to only prohibit the patronage dismissal of nonpolicymaking, nonconfidential government employees. 427 U.S. at 375.

employment decisions, such as promotions, transfers, recalls and hirings. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor, dissented and criticized the *Branti* standard as having "proved unworkable in practice." *Id.* at 110-111, (*citing*, Martin, *A Decade of Branti Decisions: A Government Officials' Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989) (surveying inconsistent federal appellate court applications of *Branti*). Justice Scalia wrote that the various interpretations of *Branti* devised by the federal courts "are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision." *Id.* at 111. As a result, the federal courts "have produced inconsistent and unpredictable results." *Id.* at 112.[4]

Finally, this Court's most recent decision in this area, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), has led to further confusion, inconsistency, and uncertainty. In *O'Hare*, this Court extended *Elrod*'s First Amendment protection against political dismissal to independent contractors. Unlike *Elrod* and *Branti*, how-

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[4] Commentators since *Rutan* have continued to criticize *Branti*'s vague standard. One commentator recently stated that the "exceptions [to patronage dismissals have] resulted in the eruption of more than twenty years of inconsistent rulings by lower courts regarding which government positions entail policymaking and, more fundamentally, how best to approach that question." Berry, *Donkeys, Elephants, and Barney Fife: Are Deputy Sheriffs Policymakers Subject to Patronage Termination?*, 66 MO. L. REV. 667 (Summer 2001). Consequently, the federal circuits have created a "less-than-uniform legal landscape" on the issue of political dismissals. *Id.* at 673.

ever, *O'Hare* involved active political speech, in addition to mere political affiliation, as the basis for dismissal. The Court acknowledged that a "different, though related, inquiry" applied "where a government employer takes adverse action on account of an employee or service provider's right of free speech." 518 U.S. at 719. The Court stated that, while political affiliation cases under *Elrod* and *Branti* solely required an analysis of whether politics was an appropriate requirement for the position at issue, political speech cases required the more detailed, case-by-case balancing test under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This Court ultimately refused to grant an absolute right for governments to enforce patronage schemes over independent contractors, and remanded the case for the lower court to determine, based on the factual record, whether the case was governed by its *Elrod/Branti* rule or *Pickering*. 518 U.S. at 726.[5]

Unfortunately, this Court did not provide any guidance as to which test applies in cases, such as the instant case, which are intermixed with elements of political affiliation and overt political speech. "In practical application,. . . .the choice of analysis is not always clear." Gibson, *Rethinking the Sixth Circuit's Erosion of First Amendment Rights in Rose v. Stephens*, 72 U. CIN. L. REV. 767, 774 (Winter 2003). In situations involving dismissal based on both speech and political beliefs, there is substantial confusion as to whether the lower courts should use *Elrod/Branti* or *Pickering*, and this difficulty has led to varying results. *Id.*

Against that backdrop, a review of the circuit case law demonstrates that the confusion stemming from *Elrod* and

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[5] In a corollary case, the Court applied the *Pickering* balancing approach to the termination of a government contract based on pure political speech in *Bd. of County Commissioners v. Umbehr*, 518 U.S. 668 (1996).

Branti's vague standard has steadily increased over the years. Not only have the Circuit courts employed different approaches, they have generated inconsistent results relating to similar employment positions. At a minimum, the confused state of the law should have entitled Petitioner to qualified immunity in the instant case. Instead, Petitioner's "incorrect" decision made against the backdrop of the inconsistent case law has exposed her to costly litigation and potentially a personal damages judgment.

II. Inter-Circuit Conflict

In granting a stay of its proceedings, the district court recognized that there was an inter-circuit conflict as to whether state's attorney investigators could be fired for political reasons. Specifically, the lower court's decision directly conflicts with the Fifth Circuit's decision in *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995). In *Gunaca*, a newly elected county district attorney refused to reappoint an investigator who had supported the former district attorney. The Fifth Circuit held that it was not clearly established that firing the investigator violated the First Amendment. *Id.* at 475. The Court held that no case "had addressed an issue sufficiently analogous that a reasonable official would understand from its resolution that it was a First Amendment violation to dismiss or to not hire an investigator on the grounds that the investigator supported the campaign of the official's opponent." *Id.* The Court concluded that "[b]ecause reasonable public officials could have differed on the lawfulness of [the district attorney's] actions at the time they occurred, [he] was entitled to qualified immunity." *Id.*

Similarly, the lower court's decision conflicts with the Second Circuit's decision in *Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1998). In *Danahy*, investigators with the state attorney general's office were fired for their political

affiliation with the prior attorney general. *Id.* at 1189. They were part of a statewide highly specialized prosecutor's office and were hired by and served at the pleasure of the attorney general. *Id.* at 1191. They worked closely with the prosecutors and dealt with highly confidential matters. *Id.* After measuring these facts against existing federal cases, the court held that the defendants could have reasonably perceived that the plaintiff investigators were policymaking or confidential employees. *Id.* at 1193. Therefore, the defendants were entitled to qualified immunity. *Id.*

In contrast to the Second and Fifth Circuits, the Tenth Circuit in *Laidley v. McClain*, 914 F.2d 1386, 1395 (10th Cir. 1990), *overruled on other grounds*, *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs*, 32 F.3d 1436 (10th Cir. 1994), held that a newly elected district attorney was not entitled to qualified immunity for firing an investigator who had supported his opponent in the election. The plaintiff was an investigator in the child support division of the district attorney's office. Her duties included locating absent parents, serving process, sending letters, conducting interviews, contacting clients, and answering the telephone. Describing the investigator as "a low-level staff employee," the court held that the plaintiffs right to her job under *Elrod* and *Branti* was clearly established. *Id.*

Similarly, in *Bauer v. Montgomery*, 215 F.3d 656 (6th Cir. 2000), a former field investigator for the Ohio Attorney General claimed that he was terminated due to his political affiliation. The Sixth Circuit held that the investigator stated a cause of action. *Id.* at 661. The court reasoned that the inherent duties of the position, which included performing background investigations, corresponding with law enforcement, and interviewing witnesses, were not political. *Id.*

III. Intra-Circuit Conflict

The case law within the Seventh Circuit has similarly generated divergent results leaving both public employers and employees with no ability to determine how the investigator position will be treated in the future. In *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990), the Seventh Circuit held that investigators for a city council finance committee could be lawfully fired based on their political affiliation. The Seventh Circuit interpreted *Branti*'s standard as focusing on the duties inherent in the office, and not the functions actually performed by the plaintiffs or their replacements. *Id.* at 431-432. The court stated that the relevant test was whether the position inherently authorized, either directly or indirectly, meaningful input into government decision making for which there was room for principled disagreement on goals or their implementation. *Id.* at 431. Given that the investigators served on a committee that made politically sensitive decisions, the court held that the investigators provided sufficient subjective input into policy decisions so as to justify their dismissal for political reasons. *Id.* at 432.

One year later, in *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991), the Seventh Circuit held that a city law department investigator could not be transferred to another position for political reasons because he was neither a policymaking nor confidential employee. The court held that the position's job duties, which mainly included handling small property claims and accident investigations, were too limited to qualify as policymaking. *Id.* at 664. The court found that the position did not have as much responsibility as other law enforcement personnel deemed to be policymakers, such as the assistant state's attorney in *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), deputy sheriff in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and city attorney in *Ness v. Marshall*, 660 F.2d

517 (3rd Cir. 1981). *Id.* The court distinguished *Hudson* on the basis that the investigator position in that case involved input into political decisions. *Id.* The court also held that the mere ability to access confidential litigation files was insufficient to justify the dismissal on political grounds. *Id.* at 665.

Five years after *Matlock*, the Seventh Circuit in *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996), held that a state's attorney was entitled to qualified immunity in a termination suit brought by a stenographer with investigator-like duties within a county state's attorney's office, because "both the law and its application to the facts are uncertain." *Id.* The court commented that "[a] regimen of case-by-case balancing makes it hard to dismiss complaints and simultaneously makes it hard to show that the right in question was 'clearly established.'" *Id.* The court found that the stenographer's duties were similar to the duties of both the city law department investigator in *Matlock* and the city finance committee investigators in *Hudson*. *Id.* at 296-297. In light of these conflicting decisions, the court concluded that the uncertainty of the law made it impossible for a state's attorney to determine with any confidence whether he was violating the First Amendment. *Id.* at 297. The court added:

> "drawing a stable line in *Elrod* [v. Burns, 427 U.S. 347 (1976)] cases has been difficult; even slight differences in the nature and context of the job can lead to opposite outcomes, as the contrast between *Matlock* and *Hudson* shows vividly. Contextual balancing tests should be worked out prospectively, rather than at the expense of public officials who guess wrong about future legal developments."

Id. at 297.

In the instant case, the lower court failed to heed its own warning to work out the *Elrod* and *Branti* analysis pro-

spectively rather than on the financial backs of elected officials. The court distinguished *Hudson* on its facts and found that Respondents' positions were analogous to the position in *Matlock*. Without any discussion of *Hernandez*, however, the court incredulously held that the law had been clearly established under *Matlock*. *See Carlson*, 374 F.3d at 466. Contrary to the Seventh Circuit's finding, a reasonable official in Petitioner's shoes could not have possibly discerned after reading *Hudson* and *Matlock*, and then *Hernandez*, that the law regarding the political dismissal of a state's attorney special investigator was clearly established in December of 2000.

Furthermore, the lower court in the instant case materially modified its application of the *Branti* standard without any prior warning. Previously, the Seventh Circuit had consistently focused on the duties inherent in the office at issue, rather than the functions actually performed by a particular person. *See Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985); *Meeks v. Grimes*, 779 F.2d 417, 420, fn. 1 (7th Cir. 1985). The inquiry had been whether the powers inherent in the office carried with them the potential for making or participating in discretionary decisions or encompassing a confidential relationship to the policymaker. *Hernandez*, 98 F.3d at 296; *Tomczak*, 765 F.2d at 642. However, in the instant case, the Seventh Circuit held that the inquiry "considers both the historical treatment of the position and the actual work performed by the people who hold the position." *Carlson*, 374 F.3d at 464-65.

Thus, while it is true that a special investigator is authorized by statute and job description to serve subpoenas and make return of process (App. 45, 72-76, 82), it is equally true that a special investigator is authorized by statute and job description to conduct investigations with full police powers which assist the state's attorney in the

performance of her duties (*Id.*). *See* 55 ILCS 5/3-9005(b) (West 1995). Had the Seventh Circuit focused on the inherent duties of the position, instead of abruptly changing its legal analysis to an "actual duties" test, it would have found that the special investigator position has the inherent ability to provide meaningful input into prosecutorial decisions, and that the position required confidentiality and a close working relationship with the elected state's attorney.

This was the approach previously taken by the Seventh Circuit in *Livas*, 711 F.2d 798, 800 (7th Cir. 1983) (assistant state's attorney), and *Upton*, 930 F.2d 1209 (7th Cir. 1991) (sheriff's deputy). Both cases upheld the political dismissals without any factual analysis of the duties actually performed by the persons who held the positions. In *Livas* the court found that a state's attorney exercises broad public responsibilities in the performance of his duties and enjoys broad discretion to set whatever policies he believes are necessary to protect societal interests, and, therefore, the state's attorney was entitled to demand absolute loyalty from his assistants who implement those policies. 711 F.2d at 801. In *Upton*, the court found that a deputy sheriff inherently enjoyed wide discretion and latitude in implementing the sheriff's basic policies and, among other things, was "expected to provide the Sheriff with truthful, accurate and beneficial information which he needs to make decisions and administer his office." 930 F.2d at 1215. Thus, a sheriff could understandably believe that political loyalty was an appropriate job requirement, especially since one of the plaintiffs in that case "took a high profile in a hotly contested campaign" and actively opposed the newly elected sheriff. *Id.* at 1216.

Furthermore, like the situation in *Livas* and *Upton*, a newly elected state's attorney enjoys the statutory power to appoint her own special investigators, or not to appoint

any special investigators at all. *See* 55 ILCS 5/3-9005(b) (West 1998). The Seventh Circuit ignored its own precedent which stated that political affiliation is both permissible and desirable for positions which are appointed directly by elected public officials. *See Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989).

The above discussion demonstrates that the Seventh Circuit has applied the *Elrod/Branti* standard in an inconsistent fashion, and that, as a result, inconsistent rulings have emerged with regard to similar positions. In its interpretation and application of *Elrod* and *Branti*, the Seventh Circuit has muddied the waters and made it impossible for elected officials in Illinois to determine with confidence whether a particular employment decision violates the First Amendment.

IV. The Circuit Courts Have Struggled Unsuccessfully to Reach a Uniform, Workable Approach to the *Elrod/Branti* Standard

The intra-circuit and inter-circuit conflicts discussed above are an unavoidable consequence of the vagueness inherent in the *Elrod* and *Branti* formulation. With nothing but a vague standard to guide them, the circuits have adopted widely varying approaches in determining what positions are politically protected, which have led, not surprisingly, to inconsistent results.

The First Circuit examines whether the position at issue relates to partisan interests or concerns. *Fuentes v. Gaztambide*, 807 F.2d 236, 241 (1st Dist. 1986). The First Circuit employs a two-pronged analysis: (1) whether the position involves government decision making on issues where there is room for political disagreement on goals or their implementation; and, (2) whether the particular

responsibilities of the position resembles a policymaker, privy to confidential information, a communicator, or some other function such that political affiliation is an appropriate requirement. *Id.* at 241-242; *Rosenberg v. City of Everett*, 328 F.3d 12, 17-18 (1st Cir. 2003).

The Second and Fourth Circuits interpret the *Branti* standard to mean that political affiliation is an appropriate requirement of a position when there is a rational connection between shared ideology and job performance. *Vona v. Co. of Niagra*, 119 F.3d 201, 207 (2nd Cir. 1997); *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997). In the Second District, "[i]f political loyalty is reasonably connected to performance of the inherent duties of the office, then that office is not protected from patronage dismissals." *Vona*, 119 F.3d at 207. Similarly, the Fourth Circuit initially inquires into whether the position relates to partisan political interests, and then, if so, the court examines the particular responsibilities of the position. *See Jenkins*, 119 F.3d at 1162.

The Third Circuit employs a highly factual and contextual "special scrutiny standard." *See Boyle v. County of Allegheny*, 139 F.3d 386, 396 (3rd Cir. 1998). While acknowledging that neither *Elrod* nor *Branti* provided explicit guidance in the practical application of the standard, the Third Circuit has embraced this vagueness, commenting that "[t]he the lack of explicit guidance . . . results in a greater flexibility on the part of lower courts to determine each case under its own facts and in its own context." *Id.* In the Third Circuit's view, this flexible standard serves the employer, who may use political affiliation where its interest is overriding and of vital importance, while at the same time protecting the First Amendment rights of the employee. *Id.*

The Fifth Circuit generally follows the *Connick/Pickering*[6] test and balances the First Amendment rights of the employee with the rights of the employer in providing loyal and efficient government services. *See Gentry v. Lowndes County*, 337 F.3d 481, 485-486 (5th Cir. 2003); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014 (5th Cir. 1984). On one end of the spectrum, if an employee is fired based solely on his private political views, no balancing takes place, and the employee will usually prevail. *Gentry*, 337 F.3d at 486; *McBee*, 730 F.2d at 1014. On the other end of the spectrum are those employees whose political speech is so destructive that "the exercise of his constitutional privileges clearly overbalanced his usefulness as an [employee]." *Gentry*, 337 F.3d at 486 (*quoting*, *Ferguson v. Thomas*, 430 F.2d 852, 859 (5th Cir. 1970)). The "mid-spectrum" cases, i.e., political association combined with some political speech, are examined under *Connick/Pickering*, whereby the court weighs the public concerns implicated by the employee's speech against the significance of maintaining a close or confidential working relationship with the employer. *Gentry*, 337 F.3d at 486. Thus, if the employee occupies a confidential or policymaking role, the employer's interests will more likely outweigh the employee's First Amendment rights. *Id.*

The Sixth Circuit examines both the inherent duties of the position at issue and the duties that the new holder of the position will perform. *Bauer v. Montgomery*, 215 F.3d 656, 660 (6th Cir. 2000). The Sixth Circuit inquires into "the position as envisioned by the newly elected official, rather than the tasks that had previously been performed by the plaintiff, because the official must be permitted to

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[6] Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

reorganize the staff." *Id.* In addition, the Sixth Circuit has "identified four categories of positions which presumptively fall into the *Branti* exception." *Id.* In doing so, the Sixth Circuit has disagreed with the First and Second Circuits which had rejected a categorical approach to applying the *Branti* exception. *See McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996).

As previously discussed, the Seventh Circuit inquires whether the position inherently authorized, either directly or indirectly, meaningful input into government decision making for which was room for principled disagreement on goals or their implementation. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). The court utilizes a functional approach and examines the powers and duties inherent in the position, which now apparently includes consideration of the historical treatment of the position and the actual work performed by the people who hold the position. *Carlson*, 374 F.3d at 464-465. In addition, the Seventh Circuit treats political speech cases, as opposed to mere political affiliation or belief, as an exception to the *Connick/Pickering* balancing test. *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993).

The Eighth Circuit has acknowledged that there have been many tests employed by the various circuits for determining whether a position is excepted under *Branti*, and that the case law has generated inconsistent and unpredictable results. *Billingsley v. St. Louis County*, 70 F.3d 61, 63 (8th Cir. 1995). The Eighth Circuit has stated that a person who performs technical, ministerial tasks is protected from patronage dismissal, but a person in a confidential position is not. *Id.* The Eighth Circuit has conceded that there are no clear guidelines for the broad range of positions in between. *Id.*

The Ninth Circuit holds that the employee's status as a policy-maker or confidential employee is dispositive, and

the *Connick/Pickering* balancing test does not apply under circumstances where the employee can be so classified. *Diruzza v. County of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000). The Ninth Circuit focuses on whether political loyalty is appropriate for the effective performance of the job based on the actual, not the possible, duties performed by the employee. *Id.* at 1310.

The Tenth Circuit holds that where a public employer has taken action based on an employee's political association or beliefs, the *Elrod/Branti* analysis applies. *Jantzen v. Hawkins*, 188 F.3d 1247, 1251 (10th Cir. 1999). If the action is taken because of an employee's speech, then *Connick/Pickering* applies. *Id.* In applying *Elrod/Branti*, the Tenth Circuit focuses on both the inherent powers of the position and the actual duties performed. *Id.* at 1253. The Eleventh Circuit likewise distinguishes between pure political association or belief cases, to which *Elrod/Branti* applies, and political speech cases, to which *Connick/Pickering* applies. *McKinely v. Kaplan*, 262 F.3d 1146, 1149, fn.4 (11th Cir. 2001).

The manner in which each federal circuit implements its respective test also varies. Some of the Circuits apply factors to determine the nature of the employee's duties, while others do not. While there are minor variations between them, the First, Second, and Ninth Circuits consult largely the same factors.[7] *Ortiz-Pinero v Rivera-*

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[7] In the First Circuit, these factors are relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *Fuentes v. Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1985 (*en banc*). Although the First Circuit considers whether the state civil service statutes give the position a particular classification, *Ortiz-Pinero v. Rivera-Arroya*,

(continued...)

Arroyo, 84 F.3d 7, 12 (1st Cir. 1996); *Butler v. N.Y. State Dept. of Law*, 211 F.3d 739, 744 (2nd Cir. 2000); *Diruzza*, 206 F.3d at 1310. The Third Circuit and Fifth Circuits each consider different factors. *Boyle v. County of Allegheny*, 139 F.3d 386, 396-97 (3rd Cir. 1998);[8] *Gentry v. Lowndes Co.*, 337 F.3d 481, 486 (5th Cir. 2003).[9] There is no indication that any of the other Circuits consult a preordained list of factors.

The circuits also employ a variety of different presumptions and rules. The Sixth Circuit employs a "tie-breaking" rule referred to as the "*Rice* canon", which provides that the *Branti* exception is to be applied broadly, so as to encompass positions considered by the legislature to be

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[7] (...continued)
84 F.3d 7, 16 (1st Cir. 1996), the Second Circuit has explicitly included it as one of the factors. *Butler v. N.Y. State Dept. of Law*, 211 F.3d 739, 744 (2nd Cir. 2000). The Ninth Circuit considers the additional factor of whether the job possesses "vague or broad responsibilities." *Diruzza*, 206 F.3d at 1310. The Ninth Circuit also applies an entirely different set of factors to positions determined to be "confidential" in nature rather than "policymaking." *See Hobler v. Brueher*, 325 F.3d 1145, 1154 (9th Cir. 2003).

[8] The Third Circuit considers whether the employee is a nonpolicymaking, nonconfidential employee, whether party affiliation is highly likely to effect an official's ability to carry out his duties, whether the employee has meaningful input into decision making concerning the nature and scope of a major program, and whether the employee acts as an advisor or formulates plans for the implementation of broad goals. *Boyle*, 139 F.3d at 396-97.

[9] These factors are the political sensitivity of the employment, the nature and content of the employee's speech or political activity, the extent of public concern implicated by the speech, and whether close confidential working relations with elected officials are necessary. *Gentry*, 337 F.3d at 486.

outside of the merit civil service. *McCloud v. Testa*, 97 F.3d 1536, 1551 (6th Cir. 1996). The Tenth Circuit uses a "close call" rule, in which close cases are to favor the employee. *Snyder v. City of Moab*, 354 F.3d 1179, 1188-89 (10th Cir. 2003). Finally, the Circuits also differ on whether the determination that a position is within the protection of *Elrod/Branti* is one of fact or law.[10]

The different applications of *Elrod/Branti* is particularly troublesome since circuit and lower courts routinely look to other circuits who have already decided whether the particular position before them is within the *Elrod/Branti* exception. *See Hobler v. Brueher*, 325 F.3d 1145, 1153 (9th Cir. 2003) (examining decisions of the First and Sixth Circuits regarding a secretary's protection within *Elrod/Branti*); *Jenkins v. Medford*, 119 F.3d 1156, 1163 (4th Cir. 1997) (examining case law of the Seventh and Eleventh Circuit to determine that deputy sheriffs were not protected positions); *Diruzza v. County of Tehama*, 206 F.3d 1304, 1311-12 (9th Cir. 2000) (the Ninth Circuit examines decisions of six other Circuits regarding deputy sheriffs, noting the 3-3 split among them).

Defendant understands that the analysis is largely factual and dependant on a variety of factors, particularly

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[10] *Compare Rosenberg v. City of Everett*, 328 F.3d 12, 18 (1st Cir. 2003) (whether or not a position is subject to political discharge is a legal question for the courts) and *Cushman v. Villiage of Ilion*, 317 F. Supp.2d 120, 126 (N.D.N.Y. 2004) (whether a person is a policymaker is a question of constitutional law for the court), *citing to Gordon v. County of Rockland*, 110 F. 3d 886, 888-889 (2nd Cir. 1997), *with Boyle v. County of Allegheny*, 139 F.3d 386, 397 (3rd Cir. 1998) (whether an employee falls within the *Elrod/Branti* exception is generally one of fact) and *Snyder v. City of Moab*, 354 F.3d 1179, 1185 (10th Cir. 2003) (whether political association is an appropriate requirement for a position is generally one of fact). *See also Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003) (mixed question of law of fact).

the nature of the government office and the duties of the employee. A bright-line rule may, therefore, be impractical if not impossible. *See Elrod*, 427 U.S. at 367 (no clear line can be drawn between policymaker and non-policymaker positions). However, this is precisely the difficulty faced by *every* public official *each* time she must make an employment decision where despite her attempts to abide by the law, shared political ideology and confidence are desired or necessary for the operation of her office. The Court should, therefore, exercise its resources in favor of granting certiorari in order to resolve these conflicts, and provide more guidance to public officials across the country.

Defendant advocates the approach taken by the Fifth Circuit. By balancing the interests of the employee and employer based on a spectrum of whether the employee was fired for mere political belief or active speech, the Fifth Circuit's approach lends more certainty to the analysis especially with regard to employees whose position may be protected under the First Amendment, but whose active speech is so disruptive that the employer should be able to terminate the employee without violating the Constitution.

V. *Application of Qualified Immunity Principles*

The above discussion clearly shows that the Seventh Circuit erred in denying Petitioner's qualified immunity defense. It is well-settled that a public official is immune from personal damages liability so long as her actions do not violate the clearly established constitutional rights of others. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The right must be clearly established in relation to the specific context confronting the public official when she acted, not as a broad general proposition. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although it is not necessary that prior case law be "on all fours" to be clearly established,

the case law must give the public official fair warning that her conduct in the present factual situation is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002); *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003), *cert. denied* by 124 S.Ct. 531 (2003). A public official is entitled to qualified immunity if, at the time she acted, the law did not clearly establish that she was prevented from firing an employee *who held the particular position at issue. See Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir.1988); *Larson v. Cantrell*, 974 F. Supp. 1211, 1217 (N.D. Ind. 1997); *West v. Phillips*, 883 F. Supp. 308, 319, fn. 11 (S. D. Ind. 1994) (emphasis added).

In the instant case, there was no U.S. Supreme Court or Seventh Circuit case which clearly established in December of 2000 that an Illinois state's attorney special investigator, who actively opposed the candidacy of, and spoke out critically against the newly elected state's attorney, could not be fired for political reasons. Furthermore, the case law involving the investigator positions generally, both within the Seventh Circuit and in other circuits, was anything but obvious in warning Defendant that her actions were unconstitutional. Thus, the Seventh Circuit erred in denying Defendant's qualified immunity defense.

CONCLUSION

For the foregoing reasons, Petitioner Mary E. Gorecki respectfully submits that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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